PUBLIC VERSION

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August 30, 2018

By ECFS

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: **Petition for Reconsideration,** ***In the Matter of Iowa Network Access Division Tariff F.C.C. No. 1*****, WC Docket No. 18-60, Transmittal No. 36**

Dear Ms. Dortch:

AT&T Services, Inc. ("AT&T") submits for filing the **Public Version** of its Petition for Reconsideration in the above-referenced proceeding. Consistent with the Commission's rules and the March 26, 2018 Protective Order entered by the Commission Staff, AT&T has redacted all "Confidential Information" from the **Public Version**, which it is filing by ECFS.

AT&T is also filing by hand with the Secretary's office one hard copy of the **Confidential Version** of this submission. In addition, copies of all versions of the submission are being served electronically on Aureon's counsel. Two copies are also being provided to Joseph Price at the Wireline Competition Bureau.

Please contact me if you have any questions regarding this matter.

Sincerely,

James F. Bendernagel

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Enclosures

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PUBLIC VERSION
REDACTED - FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	**WC Docket No. 18-60**
Iowa Network Access Division Tariff F.C.C. No. 1	**Transmittal No. 36**

PETITION FOR RECONSIDERATION OF AT&T SERVICES, INC.

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Dated: August 30, 2018

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In the Matter of	**WC Docket No. 18-60**
Iowa Network Access Division Tariff F.C.C. No. 1	**Transmittal No. 36**

PETITION FOR RECONSIDERATION OF AT&T SERVICES, INC.

Pursuant to 47 C.F.R. § 1.106, AT&T Services, Inc. ("AT&T") hereby submits this Petition for Reconsideration of the Commission's July 31, 2018 Memorandum Opinion and Order ("*Rate Order*")[1] concluding in part its investigation into Tariff F.C.C. No. 1 of Iowa Network Services, Inc. d/b/a Aureon Network Services ("Aureon").

INTRODUCTION AND SUMMARY

In addressing the CLEC benchmark rate issue, the Commission correctly identified CenturyLink as the "competing ILEC" and also correctly identified CenturyLink's tandem switching and transport as the "switched exchange access services" that CenturyLink would charge to transport the same traffic as Aureon. 47 C.F.R. § 61.26(a)(2).[2] But the Commission incorrectly calculated the composite rate when it based the rate for tandem switching and transport on Aureon's weighted average mileage.[3]

[1] Memorandum Opinion and Order, *In the Matter of Iowa Network Access Division Tariff F.C.C. No. 1*, 2018 WL 1898713 (rel. July 31, 2018) ("*Rate Order*").

[2] *Id.* ¶¶ 21-30.

[3] *Id.* ¶¶ 35-45.

As explained below in Parts I and II, the Commission's use of Aureon's mileage—as opposed to the mileage that CenturyLink would charge for the service—violates both the text of the Commission's regulations and the Commission's own stated objectives for its benchmarking rules, yielding revenues to Aureon far in excess of those that CenturyLink would recover for the very same traffic. Further, as explained in Part III, the Commission's use of Aureon's mileage is not consistent with the Commission's determination that CenturyLink is the "competing ILEC" for Aureon's CEA service, and its explanation as to why it relied on Aureon's mileage is arbitrary and otherwise relies on flawed assumptions. Accordingly, the Commission should grant this Petition and calculate the CLEC benchmark rate for Aureon's CEA service based on the mileage that CenturyLink would charge for the competitive service.

BACKGROUND

On November 8, 2017, the Commission issued its *Liability Order* in the complaint proceeding between AT&T and Aureon.[4] As part of that order, the Commission confirmed that under its *Transformation Order* rules,[5] Aureon is a competitive local exchange carrier ("CLEC") and thus subject to the CLEC benchmark rules (47 C.F.R. §§ 51.911(c) & 61.38).[6]

In adopting the CLEC benchmark rules, the Commission had several core objectives in mind.[7] Principally, the rules were designed to avoid supra-competitive prices in the market for access services by prohibiting the filing of tariffs unless CLECs "price their product at or below

[4] Memorandum Opinion and Order, *AT&T Corp. v. Iowa Network Servs., Inc., d/b/a Aureon Network Servs.*, 32 FCC Rcd. 9677 (2017) ("*Liability Order*").

[5] *In re Connect Am. Fund*, 26 FCC Rcd. 17663 (2011) ("*Transformation Order*")

[6] *Id*. ¶¶ 24-25.

[7] *See* Seventh Report and Order, *In the Matter of Access Charge Reform*, 16 FCC Rcd. 9923 (2001) ("*Seventh Report and Order*"); Eighth Report and Order, *In the Matter of Access Charge Reform*, 19 FCC Rcd. 9108 (2004) ("*Eighth Report and Order*").

the level of the incumbent provider." *Seventh Report and Order*, ¶ 45; *id*. ¶ 4 (the benchmark "will mimic the operation of the marketplace as competitive LECs will no longer be operating in the access market with tariffed rates well above the prevailing market price."). By requiring CLECs to charge a competitive rate, the Commission sought to eliminate monopoly power in the access markets and to discourage arbitrage opportunities. *See id*. ¶ 30 ("the terminating and the originating access markets … consist[] of a series of bottleneck monopolies over access to each individual end user."); *id*. ¶ 34 ("there is ample evidence that the [market failures] create an arbitrage opportunity for CLECs to charge unreasonable access rates."). The Commission had these same objectives in mind when it implemented rules specific to the market for access services provided by intermediate CLECs, like Aureon. *Eighth Report and Order*, ¶ 17 ("regulation of these [intermediate] rates is necessary for the all the reasons that we identified in the [*Seventh Report and Order*].").

To accomplish these objectives, the Commission's benchmark rules prohibit CLECs from filing tariffed rates that exceed the prevailing market price, namely the competing ILEC rate. CLECs must calculate that benchmark rate by identifying the competing ILEC, the ILEC services, and the ILEC rates that would apply in the CLEC's absence from the market. Specifically, the rules require carriers to identify: (1) the "competing ILEC" that would handle the traffic in the absence of the CLEC; (2) the access services that the competing ILEC would provide in lieu of the "switched exchange access services" used to transport that traffic; and (3) the resulting "rate charged by the competing ILEC" for those same services. *See* 47 C.F.R. § 51.911(c) ("rates for switched exchange access services … shall be no higher than the … rates charged by the competing [ILEC]"); 47 C.F.R. § 61.26(f) ("If a CLEC provides some portion of the switched exchange access services used to send traffic to or from an end user not served by that CLEC, the

rate for the access services provided may not exceed the rate charged by the competing ILEC for the same access services.").

The first step in this process is to identify the "competing ILEC," which is defined as the ILEC that would provide access services "to the extent those services were not provided by the CLEC." 47 C.F.R. § 61.26(a)(2). As the Commission recognized in its *Rate Order*, the question is whether the competing ILEC offers a service on its own network capable of transporting the same traffic; the structure of the CLEC's own network is irrelevant in this analysis. *Rate Order*, ¶ 28 ("We reject Aureon's contention that CenturyLink's network does not offer the same functionality as Aureon and thus, CenturyLink's access services cannot serve as the benchmark."); *id*. ("competitive LECs' networks and the specific technologies they use may be different than those provided by the incumbent LECs, but such differences do not necessarily preclude the ability to benchmark access services."). As the Commission properly concluded, CenturyLink is the only possible "competing ILEC" in this instance, because "it is the incumbent LEC that would provide the tandem switched transport services that Aureon provides, if Aureon did not provide them."[8]

The next step is to identify the access services that would be provided by the competing ILEC on its own network in lieu of the "switched exchange access services used [by the CLEC] to send traffic to or from an end user." 47 C.F.R. § 61.26(f). The rules define "switched exchange access services" to include the functional equivalent of "the ILEC . . . access services" typically associated with various rate elements, including "tandem switching" and "tandem switched transport facility (per mile)." 47 C.F.R. § 61.26(a)(3)(i). As noted above, this analysis looks to the competing ILEC's own network to determine the access services that the ILEC would use to transport the same traffic. Here, the competing ILEC service is tandem switching and transport,

[8] *Rate Order*, ¶ 23.

for which CenturyLink has tariffed four rate elements, including: (1) Tandem Switching Transport Fixed per MOU; (2) Tandem Switching Transport per mile; (3) Tandem Switching; and (4) Multiplexing.[9] The Commission affirmed as much in the *Rate Order*, a position to which all parties agreed.[10]

The final step is to identify the rate that would be "charged by the competing ILEC" for the access services identified above—that rate serves as the benchmark that the CLEC must meet or beat in its tariff. Rate elements (1), (3), and (4) are charged on an MOU basis, and the calculation of those elements is therefore straightforward. However, rate element (2)—the "Tandem Switching Transport per mile"—is a distance-sensitive rate element. The Commission's rules specifically permit CLECs to include tandem switching transport costs in their benchmark calculations, but as discussed in greater detail below, that calculation must be based on the distance between the competing ILEC's tandem switching offices and the end offices of the subtending LECs. The Commission failed to properly implement this step of the analysis when it used the CLEC's (Aureon's) mileage, rather than the competing ILEC's (CenturyLink's) mileage, and the Commission should modify the *Rate Order* accordingly.[11]

STANDARD OF REVIEW

The Commission possesses broad authority to reconsider its decisions where any aggrieved party provides "sufficient reasons therefor." 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(d)(1) ("A petition for reconsideration shall state with particularity the respects in which petitioner believes

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[9] CenturyLink Operating Companies Tariff F.C.C. No. 11, § 6.8.1(c)(1), 5th Revised page 6-318, 2nd Revised page 6-318.1.

[10] *See Rate Order*, ¶ 36; *id*. ¶ 35 ("All parties participating in this proceeding, including Aureon, agree that if CenturyLink is the correct competing incumbent LEC, these rates and rate elements should be used in determining the composite rate to which Aureon should benchmark.").

[11] *Id*. ¶¶ 38-43.

the action taken by the Commission or the designated authority should be changed."). The Commission's benchmark rate calculation violates the text and the policy objectives of the benchmarking rules, and it is also inconsistent with the Commission's approach in the *Rate Order* to the first two steps of the CLEC benchmark analysis. Moreover, the Commission's determination on this issue will likely impact the rate calculation in the complaint proceeding between AT&T and Aureon, including any damages calculations for the period July 1, 2013 to February 28, 2018. The Commission should therefore grant this Petition and modify the CLEC benchmark calculation in the *Rate Order*.

ARGUMENT

The Commission's *Rate Order* adopts a tandem-switched transport benchmark rate that is flawed in multiple respects. *First*, the plain text of the CLEC access rules requires CLECs to benchmark tandem switched transport charges on "the rate charged by the competing ILEC for the same access services" that the ILEC would use to transport the traffic, and thus to use the mileage between the competing ILEC's tandem switching offices and the end offices of the subtending LECs. The benchmark rules are based on the rate of the *competing ILEC's* service—not that of the CLEC; indeed, it makes no sense to have the CLEC "benchmark" against its own service.

Second, the Commission's use of Aureon's mileage contradicts the Commission's stated objectives in implementing the CLEC benchmark rules, as it fails to yield a rate that mimics a competitive market, and thus does not constrain the exercise of monopoly power, thereby encouraging arbitrage.

Third, the Commission's approach is internally inconsistent; in the first two steps of its analysis, the Commission properly recognized that reference to Aureon's own service and network structure was irrelevant. Yet in the third step, it based its rate calculation on Aureon's own service and network structure. There is no basis in the text or policy of the CLEC benchmark rules for

this hybrid approach, which would allow a CLEC to operate a less efficient network than the competing ILEC, and yet collect higher rates and revenues than the competing ILEC. AT&T accordingly requests that the Commission specify that the weighted average mileage of CenturyLink's service—rather than Aureon's service—be used in calculating the applicable CLEC benchmark rate.

I. THE COMMISSION'S BENCHMARK RATE CALCULATION VIOLATES THE TEXT OF THE CLEC BENCHMARK RULES.

The CLEC benchmark rules prohibit CLECs from filing tariffed rates that exceed the prevailing market price, namely the rate of the competing ILEC. For intermediate access services, the rule states that "[i]f a CLEC provides some portion of the switched exchange access services used to send traffic to or from an end user not served by that CLEC, the rate for the access services provided may not exceed the rate charged by the competing ILEC for the same access services." 47 C.F.R. § 61.26(f). Under the plain terms of the rule, the Commission must determine: (1) the "competing ILEC," (2) the access services that the competing ILEC would provide to replace the portion of the "switched exchange access services" that the CLEC provides to transport the traffic at issue; and (3) the resulting "*rate charged by the competing ILEC"* for "the same" transport service identified in step 2. *Id.* (emphasis added).

In its *Rate Order*, the Commission erred in step (3) when it computed the "rate charged by the competing ILEC" for tandem switching and transport based on Aureon's weighted average mileage, rather than CenturyLink's. As to that third step, the central question is how to compute the per-mile "rate charged by the competing ILEC" for Tandem Switching Transport. *Id*. The CLEC benchmark rules expressly provide that the CLEC benchmark rate can include "tandem switched transport facility (per mile)" charges, *see* 47 C.F.R. § 61.26(a)(3)(i), but the Commission's rules require that rate to be based on the competing ILEC's network, *i.e.*, the

weighted average distance between the competing ILEC's tandem switching offices and the sub-tending LEC end offices. 47 C.F.R. § 69.111(a)(2)(i) ("[T]andem-switched transport shall consist of … [a] per-minute charge for transport of traffic over common transport facilities *between the incumbent local exchange carrier's end office and the tandem switching office*," (emphasis added)); *id*. § 69.111(d)(2) (the "per-minute charge … may be distance-sensitive. Distance shall be measured as airline distance between the tandem switching office and the end office."). Indeed, the Commission rejected arguments that distance around a SONET ring would have any relevance for purposes of this calculation: "the precise routing of the traffic to the tandem, including the direction it may take around a SONET ring, is irrelevant to the rate structure because IXCs purchase transport under the three-part rate structure based on airline mileage to the tandem."[12]

Simply put, a CLEC cannot exceed the "rate charged by the competing ILEC," and the rate charged by the competing ILEC must—by Commission rule—be based on the distance between the competing ILEC's tandem switching offices and the sub-tending LEC end offices. 47 C.F.R. § 69.111(a)(2)(i). Under the text of the rule, the CLEC's current network is assumed to be non-existent. 47 C.F.R. § 61.26(a)(2) (requiring the assumption that the "services *were not* provided by the CLEC" (emphasis added)); *Seventh Report and Order*, ¶ 59 (rates are to be modeled on a "competitive market, in which *new entrants* can successfully enter only at or below the prevailing market price" (emphasis added)); *Rate Order*, ¶ 25 ("the question to be answered is whether CenturyLink would provide [the service] *if Aureon did not provide it*" (emphasis added)).

[12] *In the Matter of Access Charge Reform*, First Report and Order, 12 F.C.C. Rcd. 15982, ¶ 189 (1997) ("*Access Charge Reform Order*"); *see also Eighth Report and Order*, ¶ 21 (intermediate CLECs "that impose such charges should calculate the rate in a manner that reasonably approximates the competing incumbent LEC rate.").

In computing the benchmark rate, the Commission did not abide by its own regulations and thus chose a benchmark rate that is *neither* the "rate for the access services provided [by the CLEC]," *nor* is it the "rate charged by the competing ILEC for the same access services." 47 C.F.R. § 61.26(f). Rather, it is an unsupported hybrid of the two, which from a competitive standpoint is meaningless.

The Commission began its analysis in the *Rate Order* by noting that its benchmark rule requires a "reasonable estimate of the average distance that must be applied to the distance-sensitive Century Link rate element."[13] To determine this average mileage, the Commission next held that it must "first decide whether the rate should be based on miles for which a typical IXC connecting to CenturyLink for tandem-switched transport service would pay CenturyLink or on the miles for which such an IXC would pay Aureon if it interconnected with Aureon's actual network."[14] The Commission then mistakenly opted for the latter position, on the grounds that "[t]he Commission has never required that the mileage component of competitive LEC transport rates reflect something other than the actual network used."[15]

This is error, and misses the point.[16] The benchmark rules, which are intended to mimic a competitive market, regulate the maximum *rate* that the CLEC can charge for its access service on "the actual network used." The Commission's rules thus necessarily require the CLEC to benchmark its transport *rate* against something other than the CLEC's own network—allowing a

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[13] *Rate Order*, ¶ 37.

[14] *Id*. ¶ 38.

[15] *Id*. ¶ 42.

[16] It is also a *non sequitur*. Neither the *Rate Order* nor Aureon cites any Commission precedent holding that the transport rates must be based on the "actual network used." However, the plain text of the rule, as well as the purposes behind it, do require the use of "the rate charged by the competing ILEC" for the service at issue. 47 C.F.R. § 61.26(f).

CLEC to tariff a rate based on the CLEC's decision to carry the traffic a much greater distance than its competing ILEC would defeat the entire purpose of the benchmark rate. The CLEC is free to build its network however it chooses, and to carry the traffic as many miles as it wishes, but its tariffed *rate* for the "mileage component"—whether it is actually 103.519 miles, 22 miles, or zero miles—cannot exceed "the *rate* charged by the competing ILEC" for the same transport services. 47 C.F.R. § 61.26(f).[17]

In this case, that necessarily means that the distance-sensitive tandem switching transport charges must be based on the distance between the competing ILEC's tandem switching offices and the subtending LEC end offices, because *that* is the service that the competing ILEC (CenturyLink) would provide. 47 C.F.R. §§ 61.26(f); 69.111(d)(2). Here, the uncontested evidence shows that the weighted average transport distance between CenturyLink's tandem switches and the LEC end offices that Aureon serves is no more than 22 miles.[18] Although the Commission recognized early in its *Rate Order* that Aureon must benchmark its rate to the rate for "CenturyLink's interstate tandem-switched transport service,"[19] its resulting composite rate is not the "rate charged by" CenturyLink for that service. 47 C.F.R. § 61.26(f). Rather, it is a hybrid rate based in part on CenturyLink's tariff—but also Aureon's weighted average mileage, and thusis not a "rate [that would be] charged by" any carrier.

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[17] The Commission's further statement that it has "never precluded a competitive LEC from billing for services (or in this case, mileage) that it actually provides" (¶ 42) is equally non-responsive and arbitrary. Nothing in AT&T's approach precludes Aureon from billing for transport that it actually provides, or from hauling the traffic a greater distance than the competing ILEC would. But under the benchmark rules, the maximum tariffed effective rate for the transport service actually provided by Aureon (however long) must be limited to the "rate charged by the competing ILEC" for transport; otherwise, Aureon will be billing a rate above the prevailing market price.

[18] *See* Habiak Decl., Ex. B.

[19] *Rate Order*, ¶ 18.

II. THE COMMISSION'S BENCHMARK RATE CALCULATION VIOLATES THE STATED OBJECTIVE OF THE BENCHMARK RULES.

The Commission's *Rate Order* not only violates the text of the CLEC benchmark rules, but also contradicts the Commission's own stated objectives in implementing those rules.

A. The Commission's Benchmark Rate is Not A Competitive Rate, But Provides Aureon With Far More Revenue Than What CenturyLink Would Charge For the Same Access Services.

The Commission's benchmark rate is not in fact a competitive benchmark rate when compared to the access revenues that would be billed using CenturyLink's rate. In its *Seventh Report and Order*, the Commission stressed that its primary goal was to "mov[e] the marketplace for access services closer to a competitive model." ¶ 7. After a transition period, CLECs would have to benchmark their rates to the "prevailing market price" or be subject to mandatory detariffing. *Id*. ¶¶ 3, 37. The competitiveness of the benchmark rate, the Commission reasoned, would be reflected in the resulting revenues: "by moving CLEC access tariffs to the competing ILEC rate, we intend to permit CLECs to receive revenues equivalent to those the ILECs receive *from IXCs*, whether they are expressed as per-minute or flat-rate charges." *Id.* ¶ 54. Here, however, the benchmark rate adopted by the Commission is *not* a competitive rate, because Aureon would receive revenues that far exceed the revenues that the competing ILEC (CenturyLink) would collect in Aureon's absence for handling the same traffic and providing the same service.

Under the benchmark rule, Aureon is prohibited from tariffing a rate that results in higher revenues, regardless of whether it bills a composite rate or not. *Id.* ¶ 54. Yet, as can be seen in Table 1 below, if CenturyLink handled the volume of traffic that Aureon carried for AT&T, then under the applicable rates in the CenturyLink tariff, and using CenturyLink's services, it would have collected about **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** in revenues in 2017 from AT&T. By contrast, under the Commission's calculation of the benchmark

rate, Aureon would be entitled to receive far more revenue for transporting the same traffic: about **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** Aureon's rate for its service is thus clearly not priced "at or below the level of the incumbent provider,"[20] which is directly at odds with the purpose of the Commission's benchmark rules. **[[BEGIN CONFIDENTIAL]]**

Table 1[21]

Rate Element		**Benchmark Rate (103.519 Miles)**	**AT&T Revenue to Aureon**	**Benchmark Rate (22 miles)**	**AT&T Revenue to CenturyLink**
Tandem-Switched Transport	fixed per MOU	$0.000240	[redacted]	$0.000240	[redacted]
	per MOU	$0.003106	[redacted]	$0.000660	[redacted]
Tandem Switching		$0.002252	[redacted]	$0.002252	[redacted]
Common Transport Multiplexing		$0.000036	[redacted]	$0.000036	[redacted]
Total		**$0.005634**	[redacted]	**$0.003188**	[redacted]

[[END CONFIDENTIAL]]

B. The Commission's Approach Does Not Constrain the Exercise of Monopoly Power.

In the *Seventh Report and Order*, the Commission also recognized that "IXCs are subject to the monopoly power that CLECs wield over access to their end users." ¶ 38. This is due, in part, to the Commission's rules, and because, under those rules, "access charges are paid by the caller's IXC, which has little practical means of affecting the caller's choice of access provider (and even less opportunity to affect the called party's choice of provider) and thus cannot easily avoid the expensive ones." *Id.* ¶ 31. As a consequence, "an IXC may have no choice but to accept

[20] *Seventh Report and Order*, ¶ 45.

[21] The figures in this table are based on the 2017 MOUs presented in Mr. Habiak's Declaration. *See* Ex. B **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**

traffic from an intermediate competitive LEC chosen by the originating or terminating carrier and it is necessary to constrain the ability of competitive LECs to exercise this monopoly power." *Eighth Report and Order*, ¶ 17.

To constrain the CLEC's exercise of monopoly power and, at the same time, ensure that the IXC is charged a competitive rate for the CLECs service, the Commission adopted its benchmarking rules, which limit the revenues that the CLEC can collect to the revenues that the competing ILEC could charge if it rather than the CLEC provided the service. Under this regime, CLECs are free to provide the service in any manner that they choose. What the CLEC cannot do is collect revenues for the provision of the service in a manner that is less efficient than the manner that the service would be provided by the competing ILEC.

The Commission's decision in effect turns this regime on its head. Rather than constrain Aureon's ability to charge supra-competitive prices for its service, the Commission's benchmark rate in effect rewards Aureon for providing service in a less efficient manner than the service would be provided by CenturyLink. As the uncontested evidence shows, the average transport mileage on Aureon's network would be significantly shorter than the average mileage that would be charged by Aureon for tandem switching and transport, and as a consequence, the rates charged and the revenues collected for that service by CenturyLink would be significantly lower. *See* Table 1 above. Rather than set the applicable CLEC benchmark rate on that basis, the Commission instead opted to set the rate at a level pursuant to which Aureon would obtain significantly more revenue. That result is particularly perverse here because Aureon's network was established to lower the cost of transporting traffic to the subtending LECs. *See AT&T Corp. v. Alpine Commc'ns, LLC*, 27 FCC Rcd. 11511, ¶ 29 (2012) ("the Commission approved the creation of INS in order to *lower* the cost of transporting traffic"). Further, much of the revenue currently

generated by Aureon's service results from access stimulation traffic, which the Commission has previously concluded is problematic and should be curtailed.[22]

To avoid this result and bring Aureon's rates into compliance with its CLEC benchmark rules, the Commission should modify its *Rate Order* and mandate that Aureon benchmark its rate against the "rate charged by" CenturyLink, which would be based on the weighted average mileage on CenturyLink's (not Aureon's) network. 47 C.F.R. § 61.26(f).

C. The Commission's Benchmark Rate Calculation Encourages Arbitrage

In addition, the Commission stated that its "goal in [implementing the CLEC benchmark rules] is ultimately to eliminate regulatory arbitrage opportunities that previously have existed with respect to tariffed CLEC access services." *Seventh Report and Order*, ¶ 3. Further, in its *Transformation Order*, the Commission noted that "the continuation of transport charges in perpetuity would be problematic," in part because "service providers designate distant points of interconnection to inflate the mileage used to compute the transport charges."[23] And even more recently, the Commission noted that "today's access arbitrage schemes are often enabled by the use of intermediate access providers selected by the terminating LECs" and that its goal is to "rid the ICC system of the inefficiencies caused by access stimulation relating to intermediate access providers."[24]

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[22] *Transformation Order*, ¶ 33 ("We take immediate action to curtail wasteful arbitrage practices, which cost carriers and ultimately consumers hundreds of millions of dollars annually … We adopt rules to address the practice of access stimulation, in which carriers artificially inflate their traffic volumes to increase ICC payments.").

[23] *Id*. ¶ 820.

[24] *In the Matter of Updating the Intercarrier Comp. Regime to Eliminate Access Arbitrage*, FCC 18-68, 2018 WL 2761596, at *3 (June 5, 2018) ("*Access Arbitrage Order*").

Rather than curbing these types of inefficiencies, the benchmark rate selected by the Commission encourages arbitrage. As previously discussed, the Commission held that the appropriate mileage to use for the benchmark rate is the "actual mileage of traffic traversing Aureon's network."[25] It also suggested that Aureon is free to discard its "current policy of permitting IXCs to interconnect at any POI that is economically feasible" and could "calculate mileage based on [something other than] the airline miles between the entry and exit point on Aureon's network."[26] Under this logic, Aureon would be free to calculate mileage based on something other than airline miles—something that the Commission has barred ILECs from doing. *See Access Charge Reform Order*, ¶ 189 ("the precise routing of the traffic to the tandem, including the direction it may take around a SONET ring, is irrelevant . . . ."). Moreover, given the massive volumes of access stimulation traffic traversing its network, Aureon and the access stimulators that use Aureon's network are fully incentivized to maximize transport mileage, thereby increasing the weighted average mileage and the resulting benchmark rate. Such arbitrage should not be condoned but that, in effect, is what the Commission in its *Rate Order* has done.

III. THE COMMISSION'S USE OF AUREON'S NETWORK MILEAGE IS INTERNALLY INCONSISTENT AND OTHERWISE PROBLEMATIC.

The Commission's use of Aureon's network mileage is also internally inconsistent, because the Commission disclaimed the relevance of Aureon's network structure—and correctly so—in the first two steps of its analysis. Moreover, the Commission fails to articulate any defensible rationale for the use of Aureon's network mileage. To the contrary, its use of that

[25] *Rate Order*, ¶ 43.

[26] *Id.* ¶ 45. The Commission's statements on this point are also internally consistent, as the Commission recognized elsewhere in the *Rate Order* that "[m]ileage-based rate elements are calculated using the shortest distance between two points, regardless of the actual route followed—a distance known as airline distance." *Id.* ¶ 36 n.125.

mileage appears to be based on three mistaken assumptions: (1) that the rules require the competing ILEC's rate structure to be transposed onto the CLEC's existing network; (2) that use of CenturyLink's mileage would improperly preclude Aureon from recovering its transport costs; and (3) that AT&T's criticism of Aureon's proposed benchmark rate was based on Aureon's existing rate structure.

A. The Commission's Use of Aureon's Mileage is Internally Inconsistent

The Commission properly concluded in the first two steps of its CLEC benchmark analysis that Aureon's own network structure and functionality has no bearing on the benchmark analysis. To begin, in identifying CenturyLink as the "competing ILEC," the Commission found that "competitive LECs' networks and the specific technologies they use may be different than those provided by incumbent LECs, but such differences do not necessarily preclude the ability to benchmark access services."[27] The Commission also applied that same disclaimer in selecting the "switched exchange access services" that both the CLEC and competing ILEC would use to transport the same traffic:

> The fundamental tariffed access services at issue here are tandem switching and transport services. Those services are offered by both Aureon and CenturyLink in the relevant parts of Iowa. The fact that Aureon offers IXCs a more centralized point of interconnection does not alter the nature of the tandem switching and transport services offered by both providers.[28]

Under the benchmarking rules, the proper focus is on the ILEC that would provide the service if the CLEC did not, the service that ILEC would provide, and the rate that ILEC would charge for that service. *See* 47 C.F.R. § 61.26(f). That focus ensures that the CLEC tariff access rate is not excessive and is constrained by the competing ILEC's prevailing rate.

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[27] *Id*. ¶ 28.

[28] *Id*.

Similarly, the Commission rejected Aureon's contention that the network structure of its customers—the *IXCs*—had any bearing on the benchmark analysis. "[T]he competitive LEC benchmark obligation in our rules does not consider the possible types and sizes of IXCs that might use the competitive LEC's service."[29] Simply put, the rules focus on the rate charged by the competing ILEC for the *service it would provide* to transport the same traffic across its own network. *See* 47 C.F.R. § 61.26(f) (requiring intermediate CLECs from tariffing a rate above "the rate charged by the competing ILEC" for "switched exchange access services used to send traffic to or from an end user not served by th[e] CLEC" (emphasis added)).

Notwithstanding these determinations, in the third step of its analysis (identifying the appropriate mileage to be used for the benchmark rate), the Commission charted a different course. Rather than disregard Aureon's network structure, as it did in the first two steps of its analysis, the Commission embraced Aureon's network structure in setting the benchmark rate. In the Commission's view, it was required to "determine over how many miles, on average, *Aureon's CEA service transports traffic between Aureon's tandem switch and the POIs at which Aureon connects with its subtending LECs.*"[30] Not so. In this step of the analysis, as with the first two steps, the CLEC's own network design is irrelevant—CLECs must benchmark their rates against the "prevailing market price" for access service, which is the "rate charged by the incumbent LEC." *Seventh Report and Order*, ¶ 4. In other words, in computing the applicable benchmark rate, CLECs are to assume that their own network is non-existent and that they are entering the market as a competitor: "[o]ur benchmark system will drive CLEC rates down toward the level charged by the ILECs, thereby bringing them toward the model of a competitive market, in which

[29] *Id*. ¶ 42 n.144.

[30] *Rate Order*, ¶ 37 (emphasis added)

new entrants can successfully enter at or below the prevailing market price." *Id*. ¶ 59 (emphasis added). The Commission's reliance on Aureon's own network structure is completely at odds with these rules and is internally inconsistent.

B. The Commission's Rationale Has No Support in the Text or Policy of the Rules, and it Relies on Faulty Assumptions

In selecting Aureon's weighted average mileage, the Commission does not articulate a sound rationale for doing so. The Commission recognized at the outset that it must decide between the "miles … a typical IXC connecting to CenturyLink for tandem-switched transport service would pay CenturyLink" or, instead, "the miles … such an IXC would pay Aureon if it interconnected with Aureon's actual network."[31] It then identified the mileage that each of the parties had suggested should be used:

- **Aureon**: 104 miles, which is the average mileage between Aureon's POI in Des Moines and its other active POIs[32]
- **AT&T**: 22 miles, which is the weighted average mileage between CenturyLink's tandem switches and the local exchanges of each of Aureon's subtending LECs;[33]
- **Sprint**: 20.99 miles, which is a weighted average distance of transport based on mileage Aureon bills Sprint for intrastate tandem transport service.[34]

It did not, however, adopt any of these proposals. Instead, the Commission ultimately determined that the "average weighted miles of transport provided by Aureon in 2017,"[35] which it had asked Aureon to submit,[36] was the most appropriate figure.

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[31] *Id*. ¶ 38.

[32] *Id*.

[33] *Id*.

[34] *Id*.

[35] *Id*. ¶ 40.

[36] *See* Aureon Letter at 1, dated May 25, 2018.

In making this determination, the Commission provided three reasons for rejecting AT&T's proposal that the mileage be based on CenturyLink's network—none of which withstands scrutiny. *First*, the Commission rejected AT&T's proposal because it did "not reflect the traffic volumes and call routing on Aureon's network."[37] However, the Commission's rationale in this regard wrongly assumed that the CLEC benchmark rules require the competing ILEC's rate structure to be transposed onto the CLEC's own physical network. Section 61.26(f) contains no such requirement. Rather, the rules require CLECs to benchmark their rate against the "rate *charged by* the competing ILEC" to "send traffic to or from an end user not served by that CLEC." 47 C.F.R. § 61.26(f) (emphasis added). As AT&T explained in its Opposition, "the benchmark rate is not based on how much it would cost the incumbent to replicate the competitor's service. That has it backwards: under the rules, the competitor must tariff and charge at or below the incumbent's price, and then, in order to compete successfully, provide service as efficiently (or more so) than the incumbent. … the location of Aureon's facilities are irrelevant to determining CenturyLink's prevailing market-based rate." AT&T Opp. at 31.

The Commission's discussion of blended rates in the *Eighth Report and Order* further confirms that CLEC benchmark rate must, in fact, be based on "something other than the actual network used."[38] Where a CLEC charges IXCs a blended access rate due to the presence of multiple competing ILECs, the rate "must reasonably approximate the rate that an IXC would have paid to the competing incumbent LECs for access to the competitive LEC's customers." *Eighth Report and Order*, ¶ 48. The Commission further found that a rate does *not* "reasonably approximate" the rate the IXC would have paid to the competing ILECs if it "result[s] in revenues

[37] *Rate Order*, ¶ 42.

[38] *Id*.

that exceed those the competing incumbent LECs would receive from IXCs for access to those customers." *Id*. This necessarily requires the CLEC to determine what ILECs would charge to transport the same traffic *on their own networks*, or the resulting revenue calculations would be wildly inaccurate.[39] The same is true outside of the blended rate context: as noted above, the Commission structured the rules "to permit CLECs to receive revenues equivalent to those the ILECs receive *from IXCs*, whether [the CLECs' rates] are expressed as per-minute or flat-rate charges." *Seventh Report and Order*, ¶ 54 (emphasis in original); *supra* Part II.A.

Second, the Commission's use of Aureon's mileage appears to be based on a misdirected concern that Aureon might not be able to recover its network costs. As the Commission noted, Aureon's weighted average mileage is the proper input because the Commission has "never precluded a competitive LEC from billing for services (or, in this case, mileage) that it actually provides."[40] But this explanation cannot be reconciled with the CLEC benchmark rules, which are focused on the "services" the *competing ILEC* provides, and the rate the *competing ILEC* charges for that services. 47 C.F.R. § 61.26(f). Here, the "fundamental tariffed access services …

[39] Assume, for example, that each of CenturyLink's tandems were operated by a different carrier (Competing ILECs 1-7). In that instance, Aureon would have three options: (1) charge IXCs different rates, based on the rates that Competing ILECs 1-7 would charge for access to their end-users; (2) negotiate with the IXCs for a blended access rate; or (3) tariff a blended access rate. By selecting either the first or the third option, Aureon would be required to calculate the rate charged by each individual competing ILEC. *See Eighth Report and Order*, ¶ 47 (instructing CLECs to benchmark their rate to "the access rate that would have been charged by the incumbent LEC in whose service area that particular end-user resides"). However, by using Aureon's own weighted average mileage (103.519 miles) for each of these calculations, the resulting benchmark rate is meaningless because it does not reflect the service that the competing ILECs would provide. Even more significantly, the rate would not be competitive because it would "result in revenues that exceed those that the competing incumbent LECs would receive from IXCs for access to those customers." *Id*. ¶ 48; *see also* Habiak Decl., Ex. B (calculating the mileage between CenturyLink's tandems and the end office for each of Aureon's sub-tending LECs).

[40] *Rate Order*, ¶ 42.

are tandem switching and transport services."[41] As AT&T demonstrated, CenturyLink would charge a maximum rate of $0.003188 per minute for those services, and the Commission should have no qualms about ordering Aureon to reduce its current rate ($0.00576/min.) to that level. Indeed, the Commission fully envisioned such rate reductions when it implemented the CLEC benchmark rules. *See Seventh Report and Order*, ¶ 59 ("We recognize that the benchmark we adopt may dramatically reduce the tariffed access rates and revenues of many CLECs, particularly as the benchmark levels transition down over time. We conclude, however, that this reduction is warranted.").[42] Consequently, any claim that Aureon might not be able to recover all of its network costs under the applicable benchmark rate is not a sound reason for adopting Aureon's network mileage rather that CenturyLink's network mileage.

Third, the Commission's rejection of AT&T's analogy between Aureon's POIs and CenturyLink's tandems on the ground that the Commission can only "consider[] Aureon's existing rate structure" [43] misses the point. As AT&T explained in its Surrebuttal, CLECs cannot hide behind a composite rate in an effort to recover revenues in excess of those they could recover under the benchmark rate.[44] To illustrate that concern, AT&T compared Aureon's network with CenturyLink's, noting that Aureon's POIs are located in the same locations as CenturyLink's tandems; accordingly, if Aureon's rate structure were to mirror CenturyLink's rate structure,

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[41] *Id*. ¶ 28.

[42] Likewise misplaced is concern over whether IXCs might need the added "functionality" or "connectivity" of Aureon's network design. *See id.* ¶ 45. To the extent that such capabilities are required, the IXCs are free to obtain such services from Aureon on a contractual basis. Moreover, to the extent that Aureon believes that its CEA service would be attractive at rates higher than the CLEC benchmark rate, it is free to offer that service on a contract as opposed to tariff basis. It should not, however, be permitted to tariff that service at a rate in excess of the competing ILEC's (CenturyLink's) rate.

[43] *Id*.

[44] AT&T Surrebuttal at 20.

Aureon would be unable to recover the excessive transport charges for which it currently bills under the guise of a composite rate.[45] The point of the analogy is not to undermine Aureon's *use* of a composite rate. Rather, the analogy highlights the irrelevance of Aureon's rate structure and network design; at the end of the day, Aureon can choose whatever rate structure it wishes, provided that the revenues it collects do not exceed the revenues that the competing ILEC would recover for the same services. As demonstrated in Table 1, *supra*, that is not the case here.

CONCLUSION

For the reasons set forth above, the Commission should grant AT&T's Petition for Reconsideration and require the CLEC benchmark rate for Aureon's CEA service to be calculated based on the mileage that CenturyLink would charge for the competitive service.

[45] *Id*.

Respectfully submitted,

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Dated: August 30, 2018

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2018, I caused a copy of the foregoing Petition for Reconsideration of AT&T Services, Inc., as well as all accompanying materials, to be served via email on the following:

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